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ABSTRACT

This document discusses a recent New Jersey act that provides funds for paying a percentage of secular educational services in nonpublic schools. Recent State and U.S. Supreme Court cases dealing with the constitutionality of such aid to nonpublic schools are described. (JF)

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PUBLIC AID TO PRIVATE SCHOOLS

Talk delivered before the Convention of the New Jersey School Boards Association in Atlantic City, New Jersey on October 29, 1970 by Irving C. Evers, Esq., President, New Jersey Association of School Attorneys.

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With the passage by both houses of the New Jersey Legislature of Assembly Bill No. 1078 known as the "Non-Public Elementary and Secondary Education Act", it is of extreme interest and importance to review some of the decisions of the New Jersey Courts and Courts in other jurisdictions relative to the question of public aid to private schools.

The Bill in question was introduced on May 7, 1970 with Assemblyman Vander Plaat of Bergen County being the lead individual whose name appears on the Bill and the Bill was introduced by fifteen other Assemblymen in addition to Mr. Vander Plaat.

The Bill sets forth various factual recitals and notes that non-public education in the State today bears the burden of educating more than twenty per cent of all elementary and secondary school pupils in New Jersey and that the requirements of the compulsory school attendance law are fulfilled through such non-public education.

The Bill then goes on to provide that the act shall be administered by the Commissioner in accordance with policies formulated and regulations adopted by the State Board of Education for the administration and implementation of the

act. It empowers the Commissioner to make contracts, execute instruments, and to do all things necessary and convenient to administer the act. The Commissioner is further authorized to appoint a Director of non-public school secular education, who is placed in the unclassified civil service of the State and, within the limit of available appropriations, to appoint such other necessary personnel as shall be approved by the Board, to assist the Director of non-public school secular education in the administration of the act.

The act then goes on to provide for the methods of paying for the cost of secular educational services and limits them in the following amounts:

A. Not more than twenty per cent of the salaries of teachers teaching secular subjects;

B. Not more than $10.00 per student enrolled in grades Kindergarten through 8 and $15.00 per student enrolled in grades 9 through 12 to be used exclusively for the purchase of text books for the teaching of secular subjects.

The Bill defines the salaries of teachers for the purposes of reimbursement and limits such reimbursement to the base amount in dollars actually paid by a non-public school

to non-public school teachers but does not include allowances, contributions or credits for medical, health, hospitalization or life insurance, retirement and pension purposes, the cost of additional teacher training or education, or for any other fringe benefit. The Bill then proceeds to set limitations on the payment of salaries and it expressly provides that teachers in the non-public school shall not, by reason of any provision of the act, be deemed to be employees of the State or any public Board of Education or be entitled to any of the rights of public school teachers as provided under any law of this State or any rule or regulation promulgated pursuant to any law of the State.

The Bill then makes further provision for reimbursement of text book costs and calls upon the Commissioner to encourage Boards of Education of public schools and governing Boards of non-public schools to share facilities and personnel on a voluntary basis. It expressly provides that no public school student shall be required to attend classes and no public school teacher shall be required to teach in a non-public school.

Schools that are entitled to receive benefits under the act must be approved by the Commissioner as providing

the secular educational courses required by law; the school shall not be operated for profit; and no reimbursement shall be made to any school in which the annual cost of education per student in such school exceeds the annual cost of education per student in the public school district in which the school is located.

Schools are required to file annually with the Commissioner a certificate of compliance with Title VI of the Civil Rights Act of 1964 (Public Law 88-352) as amended. The non-public schools are prohibited from engaging specifically in educating students to become ministers of religion or to enter upon some other religious vocation; non-public schools are not entitled to reimbursement under the law for educational services for which they receive State aid for rendering such services to "children requiring special education" as defined in R.S. 18A:46-2.

The Commissioner is called upon to make provision for visitation and inspection of any one public school which applies for approval under the act and for the visitation and inspection thereafter as often as may be necessary to assure that the school in question satisfies the requirements of the act.

The act makes further provision for additional increases in the percentage of teacher salaries to be paid to non-public schools which enroll as students children determined by the Commissioner to be educationally deprived pursuant to rules and regulations promulgated by the Board.

There is appropriated under the provisions of Assembly Bill 1078 the sum of $9,500,000.00 for the fiscal year commencing July 1, 1971 which date incidentally is the effective date set forth in the provisions of Assembly Bill No. 1078.

With the passage of such legislation by both houses of the New Jersey Legislature, it becomes extremely important to consider the cases which over the years have dealt with the subject of whether or not certain aid to private schools constitutes a violation of the United States and State Constitutions dealing with the question of separation of churches and State. It will not be my purpose during the course of this talk today to express any opinions as to the possible constitutionality or unconstitutionality of Assembly Bill No. 1078 but I would rather merely devote the course of this talk to a discussion of some of the cases that are a matter of record and merely recommend that a careful

watch be undertaken by the attorneys with reference to the outcome of certain cases now pending before the United States Supreme Court and to watch carefully the outcome of any litigation that may be instituted challenging the constitutionality of A1078.

It might be well to start an examination of some of the cases dealing with this subject by referring to the leading case of Everson v. Board of Education of Ewing Township reported in 133 N.J.L. at page 350 which was a decision by the Court of Errors and Appeals rendered on October 15, 1945. That decision, you will recall, dealt with the constitutionality of Chapter 191 of the Laws of 1941 which provided for the reimbursement of the transportation costs incurred by parents in sending their children to private or parochial schools not operated for profit. The Court of Errors and Appeals upheld the constitutionality of that law and on appeal to the Supreme Court of the United States the decision was affirmed by a five to four vote of that Court and the decision is reported in 330 U.S. 1. In that decision Justice Black who wrote the majority opinion noted in the course of his opinion that the case went to "the verge".

With the enactment of Chapter 74 of the Laws of 1967 as amended by Chapter 29 of the Laws of 1968

(R.S. 18A:39-1) which law imposed upon Boards of Education the obligation to transport pupils to private schools not only along established routes but even beyond those routes, another law suit was instituted challenging the constitutionality of that law.

In McCanna, et al v. Sills, et al, 103 N.J. Super. 480 (Superior Court, Chancery Division 1968), the constitutionality of that law was upheld. Another decision upholding the constitutionality of that law was Board of Education of Woodbury Heights v. Gateway Regional High School, 104 N.J. Super. 76 (Law Division 1968). However, in West Morris Regional Board of Education v. Sills, reported in 110 N.J. Super. 234 (Chancery Division 1970) Judge Joseph Stamler ruled that the school transportation law which required school districts to bus pupils of non-profit private schools within the school district if the district transported any public school students living remotely from the school violated the equal protection clauses of the Fourteenth Amendment and the New Jersey Constitution insofar as it discriminates against the private or parochial non-profit school pupils who reside in districts which provide no tranportation to the public schools. I understand that that

case is on appeal and certainly the determination of the Appellate Division or the Supreme Court in the event it should take the case from the Appellate Division should be watched with great interest by all concerned.

There are various decisions in other jurisdictions dealing with the question of the constitutionality of statutes providing for the transportation of school children but because of some comparatively recent decisions in areas other than transportation, I would prefer to devote the balance of this talk to discussing some of those cases which concern themselves with problems very similar to the problems we can anticipate in connection with an attack upon the provisions of Assembly Bill 1078.

One of the most recent cases to come down from the Supreme Court of New Jersey is that of Clayton v. Kervick reported in 56 N.J. 523, which decision was rendered by the Supreme Court of this State on July 20, 1970.

In that case an action was brought to determine the constitutionality of the educational facilities authority law. It was argued that the law, 18A:72A-1, violated the church state provisions of the Federal and State Constitutions.

The statute in question was designed to provide

funds to finance the construction of dormitories and educational facilities for public and private institutions of higher education. The Court was careful to note that the statute does not provide for a gift or grant of State moneys to any institution. Rather the plan calls for the authority to operate on a self-sustaining basis. The authority sells its bonds to private sources and pays the principal and interest out of revenues gained by the use of moneys so obtained. Insofar as private educational institutions are concerned, the authority may lend the moneys to the institutions or the authority may erect a facility on lands conveyed to it by the instutution, return the improved property to the institution by a lease, and reconvey the title upon further performance of the lease. It was also noted in this decision that there was no gift or grant of moneys and that the bonds issued by the authority were the obligations of the authority alone. There were no debts of the State and the State's credit was not pledged to insure the payment of the securities.

. . . . The Court held that the First Amendment sounds a note of neutrality: government may neither aid nor hinder religion. But the "wall of separation" is an illusive line. The threats of religion appear in many patterns which are

essentially secular. Hence the secular aim of a statute may touch the interest of religion, and when a statute does, the question arises whether it violates the "establishment clause" to accord to a sectarian institution the benefit of that secular aim or whether to deny that benefit because the institution is sectarian will inhibit religion and thereby equally offend the Amendment.

The Court held that the situation before it in the Clayton case was quite distinct from the forbidden line and that the statute, therefore, did not offend either the State or Federal Constitution. The Court held that it was dealing essentially with a banking operation conducted by an agency of the State. Since the statute did not involve a "grant" or "subsidy" or "aid" in the ordinary sense but rather provided a service on a self-sustaining basis, it was held to be much more distant from the forbidden area than the situation in the Everson case which dealt with the bussing situation or in the Allen case which I will discuss shortly dealing with the purchase of text books.

In conclusion, the Court said that to sum up, the statute seeks to achieve a wholly secular aim, the advancement of higher education, and its primary effect neither advances nor

inhibits religion. The statute does not, the Court said, involve "aid" in the usual sense, but rather provides a needed financing service on a self-sustaining basis to all private institutions which offer higher education equivalent of that of public institutions.

With the case of Board of Education v. Allen, 392 U.S. 236, the areas where calls are made upon public funds for the support of private schools have broadened considerably.

In the Allen case, the plaintiffs who were members of a local Board of Education brought suit in the Supreme Court of Albany County, New York, requesting declaratory and injunctive relief against the enforcement of a New York statute requiring local public school authorities to lend text books free of charge to all students in grades 7 through 12, including students attending private parochial schools. The Trial Court held that the statute violated the establishment and free exercise of religion clauses of the First Amendment of the Federal Constitution. The Appellate Division reversed ordering the Complaint dismissed on the ground that the plaintiffs lacked standing to attack the validity of the statute and the New York Court of Appeals reversed holding that the plaintiffs had standing to maintain the action but the statute was not

unconstitutional.

The majority opinion of the United States Supreme Court was rendered by Mr. Justice White who held that the Federal constitutional provisions as to the establishment and free exercise of religion were not violated since the statute merely made available to all children the benefits of a general program to lend school books free of charge; the books were furnished at the request of the pupils and ownership remained at least technically in the State; no funds or books were furnished to parochial schools, and the financial benefit was to the parents and children, and not to the school; only secular books, not religious books, could receive approval for the loans, and the statute was not alleged in any way to have coerced the plaintiffs as individuals in the practice of their religion.

The Court noted that the case closest in point to the case pending before it was the famous Everson case and then went on to note that the Everson and later cases have shown that the line between State neutrality to religion and State support of religion is not easy to locate. "The constitutional standard is the separation of church and state. The problem, like many problems in constitutional law, is one of degree."

The Court further quoted from Everson to establish the proposition as to what the test is. Said the Court: "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion, then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the scriptures of the establishment clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."

The dissenting Justices in the Allen case were Mr. Justice Black, who wrote a separate dissenting opinion; Mr. Justice Douglas, who wrote a dissenting opinion and Mr. Justice Fortas, who wrote a dissenting opinion. Thus we have a decision of the United States Supreme Court six to three predicated basically on another decision of the United States Supreme Court which was a five to four decision. It can hardly be said that the decision of the United States Supreme Court, therefore, is as clear and decisive as one might hope in view of the dissents which we still find notwithstanding the majority opinion.

Another case of considerable interest that is

well worth reading is the Opinion of the Justices reported in 258A 2nd 343, a decision of the Supreme Court of New Hampshire dated October 31, 1969. The opinion was rendered to the Senate of the State of New Hampshire in connection with certain Bills that were then pending before the Legislature. One Bill authorized cities and towns to grant a tax exemption of $50.00 per year on residential real estate of any person having at least one child attending a non-public school. That was Senate Bill No. 319. Senate Bill No. 320 would include children in non-public schools in the base used for computing foundation aid to school districts. Senate Bill No. 325 would authorize school boards to furnish transportation to pupils attending non-public schools through the 9th grade outside the district even though it was unnecessary to furnish transportation outside the district for those attending public school. Senate Bill No. 326 would authorize school boards to furnish to pupils in both public and non-public schools the following child benefit services: school physician, nurse, health, guidance, psychologist, educational testing and other services deemed necessary or desirable for the well being of the pupils. Senate Bill No. 327 required local school boards to purchase such text books as are required for use in the public schools and to loan or sell them

upon request to children residing in the district enrolled in a public or approved non-public school. House Bill 401 would allow non-public school pupils to attend the public schools for part of their studies and to receive the benefit of certain public school instruction and activities.

The questions related to whether or not the proposals in question would violate the prohibitions against the use of public funds to aid or support church schools contained in Part II, Article 83rd of the Constitution of New Hampshire or the First Amendment to the Constitution of the United States made binding upon the States through the Fourteenth Amendment.

After noting the decision of the United States Supreme Court in the Allen case, the Supreme Court of New Hampshire noted that its State Constitution bars aid to sectarian activities of the schools and institutions of religious sects or denominations. However, the Court stated that since secular education serves a public purpose, it may be supported by tax money if sufficient safeguards are provided to prevent more than incidental or indirect benefit to a religious sect or denomination.

The Court held that insofar as Senate Bill 319

was concerned permitting a $50.00 tax exemption on residential real estate to be granted to persons having one or more children attending a non-public school that that would produce unconstitutional discrimination.

Senate Bill 320 which included in the base for computing foundation aid the number of children attending non-public schools was held to be unconstitutional. With reference to Senate Bill 325 which would authorize a school board in its discretion to furnish transportation for pupils attending non-public schools outside the district even though it was not necessary to furnish transportation outside the district to public school pupils, the Court said it believed that Bill to be of doubtful constitutionality. This, the Court said, was so because primarily the Bill delegated undefined discretion to the school board which is easily subject to discriminatory application.

With reference to Senate Bill 326 authorizing the furnishing of certain enumerated child benefit services, the Court held that such services as school physician, school nurse, school guidance services and the like if enacted would in its opinion be constitutional under the theory of the Allen and Everson cases dealing with child benefit.

With reference to Senate Bill 327 dealing with the loan or sale of public school text books, the Court said that that Bill if enacted would be constitutional under the Everson and Allen decisions.

In connection with House Bill 401, the Court noted that after the adoption of the resolution calling upon the Court for an opinion as to the constitutionality of the law the Bill in question became Chapter 356 of the Laws of 1969 and hence was not a matter that was pending before the Senate and, therefore, the Court did not have to give an opinion on that Bill. The Court pointed out that the question was one relating to the constitutionality of existing law and that by reason of that fact it was not the constitutional duty of the Court to give an advisory opinion.

Another case of interest is that of State v. Reutter, Director of Bureau of Finance, 170 N.W. 2nd 790 in which decision the Supreme Court of Wisconsin in 1969 held that where Marquette University, a jesuit school, had its medical school separated from the rest of the University and the Wisconsin Legislature appropriated funds for the use of the medical school, the act was constitutional; the funds in question the Court said were for a public purpose.

In Tilton v. Finch, 312 F. Supp. 1191 (U.S.D.C. Connecticut) a three judge Court held that Federal financial aid to church related colleges and universities for the construction of academic facilities is not forbidden by the higher education facilities act and does not violate either the establishment clause or the free exercise clause of the First Amendment. Certiorari in that case has been granted by the United States Supreme Court and the case is awaiting argument and decision of the United States Supreme Court during the current term.

Another case of considerable interest is the case of Lemon v. Kurtzman, 310 F. Supp. 35 (U.S.D.C.E.D. Pa.) a decision of a three judge Court rendered on November 28, 1969. That case upheld as constitutional Pennsylvania's State aid to public schools law.

Plaintiffs in that case alleged that they had not paid an admission fee to a Pennsylvania tax district because to do so would require them to pay a tax for the support of religion in violation of their rights of conscience. The status of the plaintiffs to bring the action was challenged and the Court ruled that they had standing to attack the law in question.

The plaintiffs alleged that the private schools which had contracted or would contract with the State under the act either intentionally discriminated in the selection of the students or teachers or are de facto segregated by race or religion. They also alleged that the funds received by the school under the act would be used to perpetuate or support such practices.

The Court held that although the plaintiffs had alleged as a fact the purpose of the act was to aid religion, that allegation was not a fact but a conclusion of law and as such could not be admitted for the purposes of testing the deficiency of the Complaint.

The Court noted that in its declaration of policy and legislative findings, the Pennsylvania Legislature declared that the purpose of the act was to promote the welfare of the people of Pennsylvania and to promote secular education of children attending non-public schools. This declaration of purpose the Court said was supported by specific findings of the rising costs of education, increase in school population, and increase in demands for teachers and school facilities. On its face, the Court said, the act authorizes the Commonwealth to contract only for services with the strictly secular function of educating Pennsylvania school children in the secular subjects

of mathematics, physical sciences, modern languages, and physical education. The Court noted again that in both the Everson and the Allen cases it was found that State statutes were passed to aid the public purposes of education and that neither promoted nor inhibited religion, but when neutral, did not violate the First Amendment. The Court said that the Pennsylvania statute in question was no less neutral. It should be noted that there was a dissenting opinion by Chief Judge Hasty in connection with this decision.

The United States Supreme Court on April 20th noted probable jurisdiction and this case too will undoubtedly be passed upon by the United States Supreme Court during the present term.

There are two decisions of interest coming from the Supreme Judicial Court of Massachusetts which should be noted. In one of them captioned "Opinion of the Justices, 258 N.E. 2nd 779", the Supreme Judicial Court of Massachusetts in response to a request for an opinion relative to certain proposed legislation stated that the proposed legislation which provided for the purchase by the Commonwealth of secular educational services from non-public schools and which in effect would authorize reimbursement of such schools for the costs of

providing the major part of curriculum of grades 1 through 12 would result in "aiding" such schools within the State constitutional prohibition against the use of public money or property for aiding any school not publicly owned. The Court in Massachusetts specifically held that the proposed legislation would be in violation of Article 46 of the Amendments to the Massachusetts Constitution. Whether or not the legislation in question violated the First Amendment or any part of the United States Constitution was not passed upon by the Court.

In another decision of the Supreme Judicial Court of Massachusetts also captioned "Opinion of the Justices" and reported in 259 N.E. 2nd 564 the Court again gave an opinion in connection with a proposed Bill which declared that the minimum educational development of every resident elementary and secondary school pupil in the Commonwealth serves the public purposes of the Commonweath. The proposed legislation provided that allotments would be made primarily for the purpose of each school pupil attending a public or accredited private school but that the allotment to an eligible private school pupil could not exceed the tuition charges of the private school allocable to those subjects normally taught as part of the public school curriculum, or the average cost of educating

a pupil in the local public school system, whichever was the lesser sum. No allotment could be used to subsidize the courses of religious doctrine or worship.

The Court held that the Bill involved an indirect form of aid to non-public schools which aid in question the Court said was prohibited by the Massachusetts Constitution.

Also raised in the case was the question as to whether or not the State constitutional provision prohibiting the use of public funds for private schools violated the First and Fourteenth Amendments in that in fulfilling a stated public purpose the parents or legal guardians of school pupils were being deprived of their share of public tax funds. The Court stated that in sending a child to school, a parent is not fulfilling a "stated public purpose". The significance of that phrase in the proposed Bill was the declaration of a legislative purpose. The parents of private school students and the students themselves are not denied equal protection of the laws since the Court said they have equal access to the public schools. If the children of any citizen do not choose to attend, no parent is deprived of anything, much less of any share of public tax funds. There is no constitutional right to be exempted from taxes for the support of schools or other public

services merely because a citizen does not make use of them. There is no basis for implying any right in the parents of private school students to reimbursement from public funds for any part of their expenses incurred in exercising a privilege to obtain for their children a non-public school education.

The Court held that the portion of the Bill in question authorizing assistance for all elementary and secondary school children public and private would not violate the Constitution of the Commonwealth in respect of payments on amounts allocated for children attending public schools. The Court held that the payment of vouchers for children attending private schools was violative of the Massachusetts Constitution.

On October 15, 1970, the public press reported a decision coming from a United States District Court in Connecticut, which Court consisted of a three Judge Federal Court in Hartford, which ruled that State aid to non-public schools was unconstitutional. The Court in that case issued an injunction which immediately affected approximately $6,000,000.00 earmarked for some 263 schools in Connecticut.

The suit in question had been filed by six Connecticut taxpayers represented by the Connecticut Civil

Liberties Union and challenging Public Act 791 which was the law granting State assistance to non-public schools for secular education. Later on, according to press reports, the National Association for the Advancement of Colored People joined the suit.

The Civil Liberties Union had argued that the State aid was socially destructive because it supports schools which discriminated against the blacks and the poor.

The three Judge Court found that the law set up a conflict between the religious and secular purposes of private education and, therefore, violated the operation of church and State doctrine of the First Amendment to the Constitution. So far I have seen no official reports of this decision but it certainly should be watched with great interest and as to whether or not that decision would be affected by the decision that is awaiting action by the United States Supreme Court in the Pennsylvania case is something that I cannot comment upon at the present time. I merely call this to the attention of those here present today so that all may be aware of the fact that with each passing day new cases appear which could have a very marked effect upon contemplated legislation in the State of New Jersey.

The foregoing cases which I have discussed are illustrative of the most recent cases in the very sensitive field of church State relationships.

As I indicated at the outset of this talk, my purpose has been not to express any opinions as to the constitutionality or unconstitutionality of the provisions of A1078. My only purpose was to present for your consideration the most recent cases that I have been able to find dealing with this particular subject matter so as to serve as a guide for the thinking at least of some of the State Courts and the Federal Courts as well.

I am certain that we will all await with considerable interest the outcome of the cases now pending before the United States Supreme Court, which cases I would hope would serve as a guide for the determination of any attack which might be brought and unquestionably will be brought in the State of New Jersey challenging the constitutionality of A1078 when, as and if it is enacted into law by the signature of the Governor.